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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 325

JOSEF ROSENBERG, SAMUEL FREIER and HANS EISLER,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JAMES I. CUFF,
Attorney for Petitioners.

HENRY G. SINGER and
HARRY SILVER,
With him on the brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

JOSEF ROSENBERG, SAMUEL FREIER and HANS EISLER,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Josef Rosenberg, Samuel Freier and Hans Eisler respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, July 17, 1945 (1641).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C.; Section 347 (a), and under Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11. This petition is filed within thirty days from the date of the judgment, in accordance with the rules.

Opinions Below

In overruling the demurrer of the petitioners to the indictment, Campbell, District Judge, Eastern District of New York, wrote an opinion which is reported at 47 Fed. Supp. 406 (1587-1594).* There was no other opinion in the District Court. The opinion of the Circuit Court of Appeals for the Second Circuit (Swan, Chase and Clark) has not yet been reported. It appears at 1630-1641. The concurring opinion by Clark, *C.J.* is at 1641.

Statement of Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioners and others, under Title 18, Section 88, of conspiring to violate Section 6 of Chapter 508 of the Act of July 2, 1940, 54 Stat. 714, 50 U. S. C. Appendix, Section 701, which statute authorized the President by proclamation to prohibit or curtail the exportation of certain materials, except under such rules and regulations as he shall prescribe.

The indictment, in substance, charged that petitioners and others, between February 1st, 1941 and April 14th,

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* All references are to pages of the Record.

1942* conspired to violate the provisions of the aforesaid statute. It further charged that, in violation of Presidential proclamation (No. 2413, July 2nd, 1940) platinum was exported from the United States to Portugal "through the medium of crew members employed on various vessels or steamships", and by means of "crew members employed on the Pan American Clipper" (13), both vessels and planes plying between the United States and Portugal.

Questions Presented

1. Did the Circuit Court err in holding (a) that the statute involved foreign affairs and therefore the delegation of legislative power to the President was legal, and (b) that the statute merely left "the time and detail of its execution" to the President, and was therefore constitutional?

2. Did the Circuit Court err in rejecting the contention of the petitioners that the proclamation of the President was null and void, in that it did not comply with the condition annexed by Congress to its grant of authority, to wit, the setting up and publicizing by the President of objective specifications whereby uniform administration would be provided?

3. Did the Circuit Court err in holding that the prosecution of the petitioners after June 30, 1942 was permissible, even though the statute itself was a temporary one and terminated by its own provisions on the aforesaid date?

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* The Trial Judge held that the conspiracy ended on July 10th, 1941 (144-145).

4. Did the Circuit Court err in holding that the petitioners received a fair and impartial trial, especially in view of the Court's rulings and charge on the effect of evidence of crime in which the petitioners were not involved?

5. Did the Circuit Court err in holding that the evidence was sufficient to warrant the submission of the case to the Jury, as to the petitioner Eisler.

Reasons for Allowance of the Writ

1. The decision herein upholding the constitutionality of the statute in question appears to be in conflict with the decisions of this Court in *Field* v. *Clark*, 143 U. S. 649; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

2. The decision herein apparently misinterprets the opinion of this Court in *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304.

3. The constitutionality of this statute has not been reviewed by this Court.

4. The question whether the Presidential proclamation complied with the conditions of the Congressional grant of power is an important question of Federal Administrative Law, which has not been, but should be settled by this Court. If the condition of the grant of power to proclaim prohibition or curtailment or exportation was not complied with, the decision herein is in conflict with the decisions of this Court in *Mahler* v. *Eby*, 264 U. S. 32, 44, and *Wichita*

R. R. & Light Co. v. *Public Service Commission*, 260 U. S. 48, 59.

5. This Court has never passed upon the question of whether prosecution may be maintained subsequent to the date of expiration of a temporary statute, since the enactment of Title 1 U. S. C. 29. The ruling of the Circuit Court in this case seems to be directly in conflict with this Court's holding in *The Irresistible*, 20 U. S. 551.

6. The rulings and instructions of the Trial Court departed from the basic concepts of justice that a man may not be convicted on proof of crimes committed by others.

7. The ruling of the Circuit Court on the question of joinder of offenses seems to be directly in conflict with this Court's holding in *McElroy* v. *U. S.*, 164 U. S. 76. On this same question, there is also a variance between the holding of the Second Circuit and that of the Eighth Circuit in *Coco* v. *U. S.*, 289 Fed. 33, which ought to be resolved by this Court.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the proceedings of said Court herein, being the case numbered and entitled in its docket as "United States of America, Appellee, v. Josef Rosenberg, Samuel Freier, etc., Defendants-Appellants," and that the judg-

ment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, August 15, 1945.

JOSEF ROSENBERG
Petitioner

SAMUEL FREIER
Petitioner

HANS EISLER
Petitioner

By JAMES I. CUFF,
Attorney for Petitioners.

HENRY G. SINGER, and
HARRY SILVER,
With him on the Petition.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, August 15, 1945.

JAMES I. CUFF,
Attorney for Petitioners and a member of the Bar of this Court.